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In the
Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,
PETITIONERS,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

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BRIEF FOR THE STATES OF ILLINOIS, ARIZONA, ARKANSAS, CALIFORNIA, HAWAII, IOWA, KANSAS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE ACT DEPENDS CRITICALLY ON STATES' TRADITIONAL POLICE POWERS TO IMPROVE VEHICLE SAFETY AND COMPENSATE VICTIMS 8

A. The Act Preserves An Essential Role For State Common Law, And The Decision Below Eviscerates That Role 9

B. State Tort Law Plays An Invaluable Part In Improving Vehicle Safety And Compensating Victims 10

II. THE DECISION BELOW OFFENDS STATE SOVEREIGNTY, AND ITS LEGAL RULE IS UNWORKABLE IN PRACTICE 17

A. Preemption Without A Clear Directive From Congress Offends State Sovereignty 18

B. Extending Obstacle Preemption To Cases Like This One Would Be Unworkable 21

C. *Geier* Is The Exception That Proves The Foregoing Rule 23

III. THE ACT DOES NOT SEEK NATIONWIDE LEGAL UNIFORMITY, AND PRESERVING STATE TORT REMEDIES RISKS LITTLE DISUNIFORMITY IN ANY EVENT 27

CONCLUSION 32

TABLE OF AUTHORITIES

Cases: **Page(s)**

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) ..... *passim*

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489 U.S. 141 (1989) 20

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 32

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99 N.W.2d 627 (Mich. 1959) 20

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 9

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129 S. Ct. 2710 (2009) 20

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296 F.2d 125 (7th Cir. 1961) 20

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335 S.W.2d 713 (Ark. 1960) 20

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482 U.S. 1 (1987) 18

Gade v. Nat'l Solid Wastes Mgmt. Ass'n,
505 U.S. 88 (1992) 17-18, 22

TABLE OF AUTHORITIES—Continued

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469 U.S. 528 (1985) 19

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529 U.S. 861 (2000) ..... *passim*

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498 U.S. 133 (1990) 16

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478 U.S. 221 (1986) 22

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100 F. Supp. 465 (E.D. Pa. 1951) 21

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197 S.E. 757 (N.C. 1938) 21

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511 U.S. 244 (1994) 23

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111 N.E. 1050 (N.Y. 1916) 21

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TVA v. Hill, 437 U.S. 153 (1978) 21

Wyeth v. Levine, 129 S. Ct. 1187 (2009) ..... *passim*

Statutes and Statutory Material:

21 U.S.C. § 350e(c)(1)(B) 19

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TABLE OF AUTHORITIES—Continued

49 U.S.C. § 30101 2

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49 U.S.C. § 30103(b) 9

49 U.S.C. § 30103(b)(1) 2, 9

49 U.S.C. § 30103(e) 2, 3, 7, 28

49 U.S.C. § 30111 2

49 U.S.C. § 30111(e) 13

Anton's Law § 5, 49 U.S.C. § 30127 note 4

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Regulations and Regulatory Material:

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INTEREST OF THE *AMICI CURIAE*

State common law has long held automakers accountable for injuries caused by defective vehicles. These laws not only encourage manufacturers to innovate and build safer cars, but they also ensure that injured persons receive compensation for medical expenses, lost wages, and other costs associated with their injuries. The decision below threatens to preempt a significant share of these laws, thereby reducing these incentives and shifting the costs of caring for seriously injured accident victims from automakers to state-run, taxpayer-funded programs. Because the decision undermines States' longstanding police power to protect health and safety, the Amici States have a significant interest in the outcome of this case.

But the States' interest is substantial for another, more fundamental reason. The court below rested its holding on implied "obstacle" preemption, a doctrine that several members of the Court have criticized and that results in preemption without any clear statement by Congress that it intends to displace state law. This doctrine—supplanting state law without any express congressional intent to do so—not only intrudes on state sovereignty, but it increases the risk of unpredictable decisions by courts that must evaluate preemption claims without guidance from the statutory text. The States have a profound interest in the Court's continued adherence to its long-held presumption against preempting state law and, correspondingly, to a narrowly limited application of "obstacle" preemption.

STATEMENT

Congress expressed a single purpose in passing the National Motor Vehicle Safety Act ("Act")—"to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. To this end, the Act authorizes the formulation of federal "minimum" vehicle safety standards, *id.* § 30102(a)(9), while counting on state tort law to experiment with more rigorous standards, to further deter unsafe manufacturing, and to compensate victims, *id.* § 30103(e) ("[c]ompliance with a motor vehicle standard prescribed under this chapter does not exempt a person from liability at common law"). This case asks the Court to decide whether, notwithstanding the Act's clear division of labor between state and federal law, a decision not to require lap/shoulder belts as an element of the federal "minimum" requirements also prohibits state tort law from requiring them.

1. The Act directs the Secretary of Transportation ("Secretary") to prescribe federal "motor vehicle safety standards," *id.* § 30111, and the Secretary has delegated this responsibility to the National Highway Traffic Safety Administration ("NHTSA"), an operating administration within the Department of Transportation ("DOT"), 49 C.F.R. § 1.50(a). "'[M]otor vehicle safety standard' means a *minimum* standard for motor vehicle or motor vehicle equipment performance," 49 U.S.C. § 30102(a)(9) (emphasis added), which is "practicable, meet[s] the need for motor vehicle safety, and [is] stated in objective terms," *id.* § 30111. And while the Act preempts state standards that differ from federal rules "applicable to the same aspect of performance," *id.* § 30103(b)(1), the

Act's saving clause provides that "[c]ompliance with a motor vehicle standard prescribed under this chapter does not exempt a person from liability at common law," *id.* § 30103(e).

2. One such standard is Federal Motor Vehicle Safety Standard 208 ("Standard 208"), which "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208 (S1). In 1989, NHTSA amended Standard 208 to require manufacturers to install lap/shoulder belts for rear "outboard" seats in most passenger vehicles. (An outboard seat is one located less than 12 inches from a vehicle's side wall. 49 C.F.R. § 571.3. Center seats are "inboard" seats.) NHTSA had determined that requiring lap/shoulder seatbelts for rear seats would improve passenger safety, because these belts are more effective in reducing deaths and moderate-to-severe injuries than lap-only belts. 53 Fed. Reg. 47,982, 47,982 (Nov. 29, 1988); 54 Fed. Reg. 25,275, 25,276 (June 14, 1989); 54 Fed. Reg. 46,257, 46,257-46,258 (Nov. 2, 1989). In fact, NHTSA concluded that the safety benefits from installing lap/shoulder seatbelts in the rear seats of minivans were actually "greater-than-average," as these vehicles were becoming increasingly popular and have high rear-seat occupancy rates. 53 Fed. Reg. at 47,985-47,986.

Ultimately, however, NHTSA declined to require lap/shoulder seatbelts for rear *inboard* passengers, not because the belts were any less effective in protecting the safety of these riders, but out of technical concerns and fears about the costs associated with installing belts in rear inboard seats. 53 Fed. Reg. at 47,984-47,985; 54 Fed. Reg. at 46,258. Thus, for example, NHTSA acknowledged that its rule excluded from the

lap/shoulder seatbelt requirement the seat next to the aisle on the right-hand side of many minivans, because these seats (when more than 12 inches from the vehicle's side) are technically "inboard," 53 Fed. Reg. at 47,985; 54 Fed. Reg. at 46,258, and credited one automaker's concern that installation of lap/shoulder belts for these seats might obstruct the aisle and "cause entry and exit problems for occupants of seating positions to the rear," unless "structural modifications" were undertaken at "disproportionately high cost[]," 54 Fed. Reg. at 46,258. As of 1989, therefore, NHTSA merely "encourage[d]" manufacturers to install lap/shoulder belts for these seats. *Ibid.* It was only after a congressional directive in 2002, see Anton's Law § 5, 49 U.S.C. § 30127 note, that NHTSA revised Standard 208 to require that automakers install lap/shoulder seatbelts for all rear inboard seats in many vehicles (including minvans), 49 C.F.R. § 571.208 (S4.1.5.5, S4.2.7.1).

3. Thus, when respondents manufactured petitioners' 1993 Mazda MPV Minivan, NHTSA had yet to require a lap/shoulder belt for the second row aisle seat, where Thanh Williamson was sitting when another vehicle struck her van. Pet. App. 3-4, 11. Without a lap/shoulder belt, Thanh's body jack-knifed over her lap belt, killing her; her husband and daughter were sitting in seats equipped with lap/shoulder seatbelts, and they survived. *Id.* at 3, 6. Petitioners brought suit claiming that the minivan was defective as a matter of California law because Thanh's seat had no lap/shoulder belt. *Id.* at 3-4, 23.

4. The California Court of Appeal held that Standard 208 preempted petitioners' claim. The court acknowledged that the federal rule did not expressly

preempt California law. *Id.* at 7. Nor did the court believe that Congress intended to "occupy" the "field" of automobile safety or that it is "impossible" for automakers to comply with both federal safety standards and California tort law. *Ibid.* (internal quotations and citation omitted). Rather, the court held that the continued availability of state tort remedies would raise an "obstacle" to Congress' "purposes and objectives." *Id.* at 7, 23 (internal quotations and citation omitted). The court feared that, "[i]f successful," the state-law "claim would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by [Standard 208] because it would effectively require them to install only lap/shoulder seatbelts at inboard seating positions to avoid liability under California law." *Id.* at 23. Purporting to apply *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), the court held that state-law liability under these circumstances "would stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [Standard 208]." Pet. App. 23 (internal quotations and citation omitted).

5. This Court granted certiorari on May 24, 2010.

SUMMARY OF ARGUMENT

Promoting vehicle safety was Congress' one expressed purpose in passing the Act, and to that end it preserves a significant role for state common law where, as here, that law demands more of manufacturers than the federal "minimum" requires. Experience confirms what Congress appears to have presumed—that state law is instrumental in improving vehicle safety. Alone, NHTSA is unable to keep pace with developments in safety technology, and state lawsuits have played a critical role in eliciting data needed to inform federal regulatory decisions. Where federal standards are inadequate or obsolete, moreover, the threat of liability under state law encourages automakers to innovate and build safer cars. And without any private right of action under the Act, state tort suits are the only means of legal redress for those injured by unsafe vehicles. By preempting a significant share of this state law, the decision below deprives the regulatory scheme of much of its intended benefit.

But the ruling below, if affirmed, would have negative implications well beyond the universe of vehicle safety regulation. The "obstacle" preemption doctrine on which the court below relied not only disregards a statute's plain language, but it also violates the general requirement that Congress make any intent to displace state law express. This latter, "clear statement" rule gives interested parties notice when Congress intends to preempt state law, permitting informed participation in the legislative process, including by the States. Requiring a clear statement also discourages "free-form judicial policymaking"—as members of this Court have described obstacle

preemption—and yields more predictable outcomes, rather than leaving manufacturers, consumers, and courts to guess at whether untested federal laws have displaced state law causes of action. Accordingly, obstacle preemption must be applied only rarely, when it is obvious that state law undermines Congress' express purpose in enacting legislation.

The decision below stretches obstacle preemption well past its breaking point, on the theory that this Court's decision in *Geier* requires that result. But *Geier* turned on a critical fact not present here—NHTSA had determined that giving each manufacturer a choice of safety devices would itself promote vehicle safety in the long term. *Geier* thus involved a decision by federal authorities to improve safety by protecting manufacturer choice, whereas this case involves a routine decision not to mandate a particular practice as part of the "minimum" federal safety standard. The former is an affirmative federal requirement—manufacturers shall have the right to choose—that regulators deemed necessary to promote the Act's stated aim (safety), and it preempts contrary state law that interferes with that aim; the latter is simply the failure to require something federally, subject to Congress' admonition that "[c]ompliance with a motor vehicle standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

Nor, finally, is there anything to the claim that federal preemption is necessary to avoid a patchwork of wildly divergent legal standards nationwide. The Act does not make nationwide uniformity a priority, as this Court has recognized, and, in any event, design-defect

laws vary little from State to State and are appropriately deferential to federal standards.

ARGUMENT

The decision below fails along two dimensions. First, preempting petitioner's California suit is impossible to square with the Act's plain language and with Congress' decision to preserve an important role for state law in improving vehicle safety and compensating victims. Second, preempting California law here would do violence to the presumption against federal preemption and its corollary, the requirement that Congress speak clearly when it seeks to displace state law, by stretching "obstacle" preemption well beyond its application in *Geier*. Finally, respondents' anticipated claim that preemption is required to protect automakers from inconsistent state laws is a red herring. State laws vary little on this score, and the Act contemplates some disuniformity in any event.

I. THE ACT DEPENDS CRITICALLY ON STATES' TRADITIONAL POLICE POWERS TO IMPROVE VEHICLE SAFETY AND COMPENSATE VICTIMS.

The Act identifies one aim: vehicle safety. And it sets out to achieve that aim by two, complementary means—the formulation of minimum federal safety standards, and the operation of traditional, state tort law to test more aggressive standards, provide additional deterrence, and offer otherwise-unavailable compensation to accident victims. The decision below upends this scheme and forfeits the significant advantages in Congress' two-tiered approach to safety regulation.

A. The Act Preserves An Essential Role For State Common Law, And The Decision Below Eviscerates That Role.

The Act's plain language assumes that state tort law may impose higher burdens on vehicle manufacturers than the baseline, federal standards will. Federal regulations establish "minimum" vehicle safety standards, 49 U.S.C. § 30102(a)(9), and States may not adopt inconsistent regulations, *id.* § 30103(b), but the Act's saving clause warns that merely satisfying the federal "minimum" "does not exempt a person from liability at common law," *id.* § 30103(b)(1). "'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). And the "'plain wording'" of a statute provides the "'best evidence'" of Congress' intent. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Here, the Act's "plain wording" eliminates any doubt over Congress' intent: States may not adopt regulations that differ from their federal counterparts on the same subject, but compliance with federal standards does not relieve an automaker from damages liability under state tort law.

The court below ignored this intent when it held that regulatory compliance relieves automakers of common-law liability for failing to take a precaution where, as here, there is evidence that NHTSA declined to require that precaution as part of the federal "minimum." But that holding renders the Act's saving clause largely meaningless. It cannot be that the clause applies only where federal regulators fail even to consider a more stringent standard, as the decision

below would have it. Such a rule would preserve a role for state common law only in areas where NHTSA chose the federal "minimum" from an abridged menu of options, one that omitted the practice that state law requires in a later case. And it would open the door wide to abuse, encouraging automakers to bury NHTSA in endless lists of regulatory options, only to claim later that any option not adopted by the agency is off limits as grounds for liability under state law. Such a rule preserves little state law from federal preemption.

The California appellate court's error becomes even more obvious when one considers the generally applicable presumption against preemption, and the corresponding requirement that Congress speak clearly when it supplants state law, additional elements of a proper preemption analysis addressed in Part II, *infra*. If left standing, the decision below would substantially undermine Congress' plan to supplement federal safety regulation with liability under state common law. And as the next section shows, this would have significant practical consequences.

B. State Tort Law Plays An Invaluable Part In Improving Vehicle Safety And Compensating Victims.

Experience has shown the wisdom of Congress' decision to preserve a substantial role for state tort law under the Act. Federal regulators have lacked resources needed to police vehicle safety effectively without help from private litigants, whose common-law suits have proved essential in encouraging manufacturers to innovate in the area of passenger safety and in eliciting information needed for future standard-setting. Moreover, there is no private right of action for damages

under the Act, leaving state tort suits as the only means for those injured by unsafe vehicles to recover from manufacturers. Accordingly, it is essential to the Act's express purpose that individuals remain free to pursue state tort claims against automakers even where, as here, manufacturers' common-law duties are more expansive than the federal "minimum."

1. As an initial matter, "[f]ederal labeling and design requirements are sometimes the product of political compromises, excessive influence within the agency by the regulated industry, or excessive dependence upon industry sources for necessary information." Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 Md. L. Rev. 1210, 1238 (1996) (footnotes omitted); see also *id.* at 1238 nn.167-169 (collecting citations). "Tort liability offsets these flaws in the regulatory process by encouraging manufacturers to exceed federal safety requirements when it is cost-effective to do so." *Id.* at 1238. Thus, rather than conflicting with federal safety aims, state tort law "offers an additional, and important, layer of consumer protection that complements [federal] regulation." *Wyeth*, 129 S. Ct. at 1202; accord *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451 (2005) ("[p]rivate remedies * * * aid, rather than hinder, the functioning of" federal law).

Indeed, NHTSA's lack of resources and other limitations are well-documented. Each year, the agency receives more than 30,000 complaints, but its staff (which numbers less than 650) opens only approximately 100 investigations. See U.S. Dept. of Transp. Fiscal Year 2009 Budget In Brief, at 76, available at http://www.dot.gov/bib2009/pdf/bib2009.pdf; Jo Craven McGinty, *How Safety Agency Investigates*

Complaints, N.Y. Times, Mar. 1, 2010. And NHTSA makes only limited use of its statutory authority to issue fines and subpoenas; lacks technical expertise in certain areas; suffers from frequent turnover in leadership; and, according to a former director, "'doesn't always have the staff or money'" to police vehicle safety effectively. Eric Lichtblau & Bill Vlasic, *Safety Agency Scrutinized as Toyota Recall Grows*, N.Y. Times, Feb. 10, 2010. As a result, congressional officials and experts have concluded that NHTSA is either overly dependent on automakers for information regarding vehicle safety or, worse, captive to the industry it is charged with regulating. See *ibid.*; cf. *Wyeth*, 129 S. Ct. at 1202 (recognizing, in course of rejecting preemption claim, that "[t]he FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the post-marketing phase as new drugs emerge").

The well-publicized problems at Toyota present a recent illustration. Since late 2009, the automaker has recalled more than 8 million vehicles to address safety problems. See Lichtblau & Vlasic, *supra*. But NHTSA had been receiving complaints about sudden, unintended acceleration in Toyota automobiles since 2000, without taking any meaningful, responsive action. See *ibid.*; Micheline Maynard, *U.S. Considers Brake Override System*, N.Y. Times, Mar. 2, 2010. Only now that unintended acceleration is believed to have caused 89 deaths is NHTSA taking steps, see Maynard, *supra*; Associated Press, *Sudden Acceleration Death Toll Linked to Toyota Rises*, N.Y. Times, May 25, 2010, a delayed response that has become the subject of a

congressional investigation, see Lichtblau & Vlasic, *supra*.

2. But even if NHTSA could enforce federal standards effectively, evolving technology quickly renders the standards themselves obsolete. Knowledge and technology are constantly advancing, yet safety standards, once issued, may remain in place for years. And without the specter of state tort liability, automakers have little incentive to incorporate new safety technology, much less to invest in innovation; it is easier and cheaper merely to comply with the outmoded federal standard. See generally Stephen G. Breyer, Regulation and Its Reform 105 (Harvard Univ. Press 1982) ("a design standard tends to freeze existing technology" and "diminish[] incentive[s] to look for better methods").[1]

For example, it took the repeated failure of Firestone tires installed on Ford Explorer vehicles (and the ensuing likelihood of rollover) plus prodding by Congress for NHTSA to revise a 1971 roof crush resistence standard for the first time *in 2008*. See generally Allison M. Zieve, *Thoughts on the Rise and Decline of the Implied Preemption Theory for State Law Damages Claims*, 65 N.Y.U. Ann. Surv. Am. L. 661, 674-675 & n.62 (2010); David C. Vladeck, *The Emerging Threat of Regulatory Preemption* 9 (Amer. Const. Soc'y

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[1] Congress recognized and sought to address this problem. The Act requires the Secretary to "establish and periodically review and update on a continuing basis a 5-year plan for testing motor vehicle safety standards prescribed under this chapter that the Secretary considers capable of being tested." 49 U.S.C. § 30111(e). As we explain, however, NHTSA has not been able to satisfy this requirement.

for Law & Policy 2008), available at http://www.acslaw.org/files/Vladeck%20Issue%20Brief.pdf. Technology had changed substantially during those 37 years, and by the time NHTSA proposed the new standard, a number of automakers were already producing cars that met or exceeded it. See Zieve, *supra*, at 675 & n.66. Congress also ordered NHTSA to require manufacturers to install tire pressure monitoring systems—which improve fuel economy, extend tire life, and prevent crashes—in all new vehicles. See *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 43-44 (2d Cir. 2003). Although NHTSA had rejected such a requirement nearly two decades earlier (citing cost and feasability concerns), technology had "substantially improved" in the interim, making these systems more readily available, and at lower cost. *Ibid.* Nor is it difficult to find other examples of NHTSA's failure to keep pace with advances in safety technology. See, *e.g.*, Vladeck, *supra*, at 9 ("NHTSA's fuel safety standard is at least thirty-five years out of date, even though fuel-fed fires are a leading cause of fatalities in vehicle crashes.").

3. And while state tort suits encourage innovation and hold manufacturers to an evolving standard that accounts for changing technology, this is not all that these suits do. Private tort litigation serves as a "catalyst" for improved safety by eliciting information used in future standard-setting. *Bates*, 544 U.S. at 451. Material produced during litigation helps regulators and the public identify problems associated with particular products. See *Wyeth*, 129 S. Ct. at 1202 (tort suits "may motivate injured persons to come forward with information" and "uncover unknown * * * hazards"); *Bates*, 544 U.S. at 451 (tort suits "may aid in the

exposure of new dangers") (internal quotations omitted). At the same time, the prospect of damages liability may encourage manufacturers to disclose known safety risks. See *Wyeth*, 129 S. Ct. at 1200, 1202 (tort suits "provide incentives for * * * manufacturers to disclose safety risks promptly" and "motivat[e] manufacturers to produce safe and effective" products); *Bates*, 544 U.S. at 451 (tort suits "provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement") (internal quotations omitted).

Recent suits against Toyota are producing information useful in isolating the cause of the acceleration problem. See Bill Vlasic, *Lawsuit over Crash Adds to Toyota's Difficulties*, N.Y. Times, Feb. 5, 2010. Likewise, tort suits elicited important information about the Ford/Firestone problem. See Zieve, *supra*, at 674 & n.62. And it was state tort litigation that prompted the disclosure of safety information about Vioxx (a pain management drug later shown to carry cardiovascular risks) that eventually led to its withdrawal from the market. See Elizabeth J. Cabraser, *When Worlds Collide: The Supreme Court Confronts Federal Agencies with Federalism in* Wyeth v. Levine, 84 Tul. L. Rev. 1275, 1292 & nn. 71-72 (2010).

4. Finally, state tort suits represent the only means by which injured parties can recover from at-fault manufacturers. Unlike many federal laws, the Act offers no private right of action for damages, and this fact alone counsels heavily against preempting state law. Indeed, when Congress has in rare cases expressly preempted tort law, "it has generally provided a federal

remedy in lieu of the displaced state remedy." Vladeck, *supra*, at 2 & n.4; see also *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144-145 (1990) (ERISA provision giving plan participants civil action to address violations favors preemption).

Conversely, the Court should be reluctant to preempt state law where federal law provides no remedy, for Congress was unlikely to intend that result. See *Bates*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); *Lohr*, 518 U.S. at 487 (plurality op.) (view that "Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device" is "unpersuasive" and "implausible"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (recognizing "Congress' failure to provide any federal remedy" for injured persons, and stating that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). This reluctance acknowledges that state tort suits have a "compensatory function" that is "distinct" from the role of federal statutes and regulations. *Wyeth*, 129 S. Ct. at 1202; accord *Sprietsma*, 537 U.S. at 64 ("It would have been perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating victims.").

This distinct and separate function is a critical component of the States' traditional ability to protect the health and safety of their residents. States have a "compelling interest" in "ensuring that victims * * * are

compensated by those who harm them." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991); see also *infra* pp. 20-21 (describing state law's traditional operation in field of automobile defect claims). Preempting state tort law, without providing a federal remedy, significantly interferes with that interest. See *Lohr*, 518 U.S. at 488 (plurality op.) (preemption of tort claims would require "great[] interference with state legal remedies, producing a serious intrusion into state sovereignty"). And that interference is no less here, where the court below held that federal law preempts state common law because the latter was more rigorous than the federal "minimum."

II. The Decision Below Offends State Sovereignty, And Its Legal Rule Is Unworkable In Practice.

Part I showed that the decision below is impossible to square with the Act's plain language and would strip Congress' intended, state/federal scheme of many of its benefits. But the decision also founders on another, more fundamental ground. The doctrine of obstacle preemption, which the court below applied, displaces state law without any express congressional intent to do so, a violation of the "clear statement" rule that offends state sovereignty and leaves courts to decide preemption claims without any guidance from the statutory text. See *Wyeth*, 129 S. Ct. at 1207-1208, 1214-1217 (Thomas, *J.*, concurring in the judgment) (suggesting that Court abandon doctrine altogether); *Bates*, 544 U.S. at 459 (Thomas, *J.*, concurring in judgment in part and dissenting in part); *Geier*, 529 U.S. at 906-08 (Stevens, *J.*, dissenting); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, *J.*, concurring in part

and concurring in the judgment). These concerns counsel powerfully against a broad use of obstacle preemption, and the court below erred in concluding that *Geier* compels its application here.

A. Preemption Without A Clear Directive From Congress Offends State Sovereignty.

Any "pre-emption analysis must be guided by respect for the separate spheres of governmental authority preserved in our federalist system," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (internal quotations omitted), and these concerns are heightened here, where the federal law implicates an area of historic state regulation. Recognizing the gravity of any decision to preempt the law of another sovereign, federal preemption doctrine includes as its "cornerstone[]" a strong presumption against preemption. *Wyeth*, 129 S. Ct. at 1194. The presumption rests on "respect for the States as 'independent sovereigns in our federal system,'" which requires an "assum[ption] that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Id.* at 1195 n.3 (quoting *Lohr*, 518 U.S. at 485). Courts must proceed on the view "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 1194-1195 (quoting *Lohr*, 518 U.S. at 485). The corollary to this presumption is the "clear statement" rule: if Congress "intends to alter the usual constitutional balance between the States and the federal government," it must "make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotations and brackets omitted).

1. The importance of the "clear statement" rule cannot be overstated. The requirement that Congress give notice of its intent to preempt state law guarantees the continued "effectiveness of the federal political process in preserving the States' interests." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). It "place[s] * * * the power of pre-emption squarely in the hands of Congress, which is" best "suited * * * to strike the appropriate state/federal balance." *Geier*, 529 U.S. at 907 (Stevens, *J.*, dissenting). James Madison thus predicted that Congress, because it is comprised of members from each State, would "'be disinclined to invade the rights of the individual States, or the prerogatives of their governments.'" *Garcia*, 469 U.S. at 551 (quoting The Federalist, No. 46, p. 332 (B. Wright ed., 1961)). Madison "placed particular reliance" on the Senate, which, because the States are equally represented therein, is "'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residual sovereignty.'" *Id.* at 551-552 (quoting The Federalist, No. 62, p. 408 (B. Wright ed., 1961)).

But States have no occasion to protect "the prerogatives of their governments" from federal preemption if the bill under consideration in Congress does not purport to preempt state law. This case illustrates the point. The Act's saving clause expressly preserves common-law remedies, and therefore no State opposed to the preemption of state tort claims would have voiced those concerns in the run up to the Act's passage. Congress knows well how to require "obstacle" preemption expressly, see, *e.g.*, 21 U.S.C. § 350e(e)(1)(B) (state "requirement" "is pre-empted if" "as applied and

enforced[, it] is an obstacle to accomplishing and carrying out this section or a regulation prescribed under this section"); 49 U.S.C. § 5125(a) (same), and the bill that became the Act did not do so.

2. The fact that the Act "'legislate[s] * * * in a field which the States have traditionally occupied'" also counsels against preemption, particularly without express congressional authorization. *Wyeth*, 129 U.S. at 1194 (quoting *Lohr*, 518 U.S. at 485) (omission in original); see also *id.* at 1200 ("case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them'") (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167 (1989) (brackets in original)); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2720 (2009) (declining to "minimize[]" "the incursion that the Comptroller's regulation makes upon traditional state powers").

Providing legal redress for accident victims is a long-established, sovereign prerogative of the States, whose police power exists to protect health and safety. See generally *Lohr*, 518 U.S. at 485 (recognizing "the historic primacy of state regulation in matters of health and safety"). And state law has controlled in product-related suits against automakers since well before the Act's enactment in 1966. See, *e.g.*, *Elliott v. General Motors Corp.*, 296 F.2d 125 (7th Cir. 1961) (applying Indiana law); *Ford Motor Co. v. Fish*, 335 S.W.2d 713 (Ark. 1960); *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959); *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951) (applying Virginia

law); *Jastrzembski v. General Motors Corp.*, 100 F. Supp. 465 (E.D. Pa. 1951) (applying Pennsylvania law); *Jones v. Raney Chevrolet Co.*, 197 S.E. 757 (N.C. 1938); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (Cardozo, *J.*). The decision below supplants a significant share of the States' traditional role in this area, without any indication that this is what Congress intended.

B. Extending Obstacle Preemption To Cases Like This One Would Be Unworkable.

Without a clear statement from Congress, the decision below allows courts to preempt state law in an undefined universe of future cases, without any guidance from the Act itself. This not only encourages unpredictability in the law, but it blurs the distinction between the legislative and judicial functions. The Constitution "prohibits one branch [of federal government] from encroaching on central prerogatives of another," *Miller v. French*, 530 U.S. 327, 341 (2000), and it is "the exclusive province of Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation," *TVA v. Hill*, 437 U.S. 153, 194 (1978). As Madison warned, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." The Federalist, No. 47, p. 300 (Clinton Rossiter ed., Signet Classic 2003) (internal markings omitted).

Courts following the decision below—which requires preemption whenever state tort claims "stand as an obstacle" to Congress' supposed "purposes and

objectives," Pet. App. 7 (internal quotations and citation omitted)—must try "to reconstruct how the enacting Congress would have resolved questions about the statute's preemptive effect if it had considered them long enough to reach agreement." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 277 (2000). But this is a perilous task, and courts run the risk of preempting state law when doing so "is less a reflection of congressional intentions and more a form of accidental preemption, based solely on the sensibilities of the Justices." Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption Against Preemption,"* 84 Tul. L. Rev. 1185, 1199 (2010).

1. As an initial matter, the endeavor itself risks treading on the "policy choices and value determinations constitutionally committed for resolution to the halls of Congress." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). One member of the Court has thus warned that "[a] free wheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade*, 505 U.S. at 111 (Kennedy, *J.*, concurring in part and concurring in the judgment). Another admonished more recently that "'[p]re-emption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking.'" *Wyeth*, 129 S. Ct. at 1217 (Thomas, *J.*, concurring in the judgment) (quoting *Geier*, 529 U.S. at 911 (Stevens, *J.*, dissenting)).

2. Beyond what appears on the face of the law itself, congressional intent may be difficult to discern. "Federal legislation is often the result of compromise

between legislators and 'groups with marked but divergent interests,'" and "a statute's text might reflect a compromise between parties who wanted to pursue a particular goal to different extents." *Wyeth*, 129 S. Ct. at 1215 (Thomas, *J.*, concurring in the judgment) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002)); see also *Landgraf v. USA Film Prods.*, 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal."). As an example, Congress might adopt "a statute [that] reflect[s] a compromise in which legislators who wanted stricter federal standards settled for laxer standards in exchange for not displacing state tort actions." Kevin O. Leske & Dan Schweitzer, *Frustrated with Preemption: Why Courts Should Rarely Displace State Law under the Doctrine of Frustration Preemption*, 65 N.Y.U. Ann. Surv. Am. L. 585, 591 (2010). Preempting state law without any clear authority from Congress "risks upsetting the legislative bargains out of which the statutes were hammered." Nelson, *supra*, at 280. And it "leaves Congress, regulated industries, and consumers to guess at whether untested federal laws have displaced state * * * common-law causes of action." Peck, *supra*, at 1187.

C. *Geier* Is The Exception That Proves The Foregoing Rule.

The court below concluded that *Geier* compelled it to preempt California common law, but *Geier* does not control here. The NHTSA rule in that case served the one aim set out on the face of the Act itself—improving vehicle safety. See *supra* p. 2; *Motor Vehicle Mfrs. Ass'n*

v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 55 (1983) ("Congress intended safety to be the pre-eminent factor under the Act."); see also *ibid.* (legislative history confirms Congress' intent that vehicle safety be Act's "'paramount purpose'" and "'overriding consideration in the issuance of standards'" (quoting House and Senate Reports)). The regulatory record showed a clear determination by the agency that vehicles would be safer in the long term if automakers had a choice whether to install airbags in the short term. Here, in contrast, NHTSA considered a host of reasons in declining to require shoulder/lap belts for rear inboard seats, and most of those reasons had nothing to do with promoting vehicle safety. If obstacle preemption should ever apply—and members of the Court have raised serious questions on this score, see *supra* pp. 17-18—then it should apply only in cases, like *Geier*, where state law interferes with an express congressional objective (*e.g.*, safety). Such a limitation minimizes the offense to state sovereignty and gives courts some guidance in displacing state law.

1. In *Geier*, the Court held that a prior version of Standard 208 preempted state tort claims predicated on an automaker's failure to install an airbag. Notwithstanding the absence of a clear statement of congressional intent to preempt, see 529 U.S. at 867-868 (rejecting express preemption), the *Geier* Court determined that a state "no airbag" law would conflict with the Act's articulated goal of promoting safety, see *id.* at 874-875. Indeed, the administrative record showed that NHTSA "deliberately sought variety" among passive restraint devices as the most effective way to improve safety. *Id.* at 878. In NHTSA's view, offering manufacturers "a range of choices among

different passive restraint devices" "would bring about a mix of different devices introduced gradually over time," *id.* at 875, and this, in turn, "would help develop data on comparative effectiveness," "allow the industry time to overcome the safety problems and high production costs associated with airbags," and "facilitate the development of alternative, cheaper, and safer passive restraint systems," *id.* at 879. The standard thus embodied NHTSA's "policy judgment that safety," the Act's one stated purpose, "would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (internal quotations omitted, emphasis in original). Given NHTSA's "affirmative 'policy judgment'" that encouraging installation of a variety of devices would make vehicles safer in the long run, *Sprietsma*, 537 U.S. at 529 (describing facts in *Geier*), the *Geier* Court was willing to overcome the presumption against preemption, find preemption broader than the language of the Act's preemption provision admits, and deprive the saving clause of its full effect.

These aspects of *Geier* may make it a strong candidate for reexamination by the Court at some point. But for now they counsel powerfully for limiting *Geier*'s rule to instances where NHTSA concludes that a more rigorous law would *undercut* the Act's sole, stated aim. It is the difference between requiring that manufacturers have a choice to promote vehicle safety (*Geier*), and declining to limit that choice, for any number of reasons, as part of the federally established "minimum" requirements for manufacturers.

This case falls plainly into the latter camp, and the court below therefore erred in relying on *Geier* to hold

petitioners' state-law claims preempted. There was no showing here that NHTSA sought to promote vehicle safety by giving automakers a choice between lap-only and lap/shoulder belts, much less that more demanding state laws would make passengers less safe. Indeed, as petitioners and the United States ably explain, no such showing is possible on this record. See Pet. Br. 35-39, 48-49; U.S. Br. on Cert. Pet. 9-15. Given the safety benefits associated with lap/shoulder seatbelts, NHTSA actually stated a preference for these belts. See *supra* pp. 3-4; Pet. Br. 36, 37, 40; U.S. Br. on Cert. Pet. 14. The agency only declined to require them as part of the federal "minimum" requirements—not out of concern over safety—but based on an assessment of technical feasibility and cost. See *supra* pp. 3-4; Pet. Br. 39-40; U.S. Br. on Cert. Pet. 14-15.[2] To avoid repetition, we will not elaborate on these points, other than to emphasize that affirmance of the decision below would require the Court to expand its ruling in *Geier* significantly. More broadly, it would require the Court to extend its until-now limited doctrine of obstacle preemption, to the detriment of salutary rules of construction and the federal-state balance.

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[2] *Geier* is distinguishable on the additional ground that DOT argued in favor of preemption there, a fact this Court stressed in its opinion, see 529 U.S. at 883, whereas DOT disfavors preemption here, see U.S. Br. on Cert. Pet. 9, 17.

III. The Act Does Not Seek Nationwide Legal Uniformity, And Preserving State Tort Remedies Risks Little Disuniformity In Any Event.

Finally, *Geier* cited evidence in the Act's legislative history that Congress sought "'a uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.'" 529 U.S. at 871 (quoting House Report). Undoubtedly, respondents will raise this same interest in uniformity as reason to preempt California law here. But the Act itself makes no reference to promoting legal uniformity, and there is nothing for respondents in the legislative history, either. Nor is there reason to predict that state law will yield significant disuniformity in any event.

1. The only published legislative history of the Act is a Senate Report, and this report mentions uniformity only once, when it expresses a preference that "motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 1301, at 12 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2720. In the very next paragraph, however, the Report makes clear that "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care." *Ibid.* The Report's reference to "uniformity" thus appears to stress the need for a uniform federal baseline, not an all-encompassing federal standard that precludes more rigorous state requirements.

In any event, by the time the Act became law, its own language was more definitive than the Report on

the role reserved for state common law. Whereas the Report states that compliance with federal standards would "*not necessarily* shield any person from product liability at common law," *id.* at 2720 (emphasis added), the Act is clear that compliance with federal law "*does not* exempt a person" from common-law liability, 49 U.S.C. § 30103(e) (emphasis added). Indeed, even *Geier* acknowledges that "the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." 529 U.S. at 871; cf. *Riegel v. Medtronic*, 552 U.S. 312, 326 (2008) (Medical Device Amendments Act preempted state law where former had express preemption provision and no saving clause, and where Court could determine that Act reflected Congress' "solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of all 50 States to all innovations").

In short, because safety—not uniformity—was Congress' stated aim in passing the Act, concerns about the "conflict, uncertainty, [and] cost" that may accrue if state damages remedies are preserved, *Geier*, 528 U.S. at 871, should play no role in the preemption analysis here.

2. Nor is there any reason to believe that state tort suits will lead "to a 'crazy quilt' of [federal] standards or otherwise create[] any real hardship for manufacturers." *Bates*, 544 U.S. at 451-452. Tort claims charging vehicle design defects vary little from State to State. A substantial majority of jurisdictions follow Third Restatement principles, which require plaintiffs to prove more than an auto-related injury;

they must establish the automaker's negligence. See David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 749 (2008) ("[T]he Third Restatement correctly endorses the widespread judicial practice of applying negligence principles * * * as the basis for liability for dangers in product design"); Victor E. Schwartz, et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 937 (2009) ("Courts throughout the United States have largely adopted [Third Restatement] principles, rejecting strict liability for design * * * defects.").

Most jurisdictions thus require plaintiffs to show that "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design * * * and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2(b) (1997). This standard is meant to "achieve the same general objectives as does liability predicated on negligence." *Id.* at cmt. a.[3] It recognizes that "[m]any product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable," and

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[3] Failure-to-warn claims also require a showing of manufacturer negligence under the Third Restatement. See Restatement (Third) of Torts: Products Liability § 2(c) & cmt. a (1997). And this, too, is the prevailing rule among the States. See George W. Flynn & John J. Laravuso, *The Existence of a Duty to Warn: A Question for the Court or the Jury?*, 27 Wm. Mitchell L. Rev. 633, 638 (2000).

requires an "independent assessment of advantages and disadvantages" of increased safety (or "'risk-utility balancing'"). *Ibid.*; see also *id.* at cmt. d. Even the few jurisdictions that have not adopted Third Restatement principles for design-defect claims apply a negligence-like standard. See Owen, *supra*, at 749 ("It [was] an open secret for many years" prior to Third Restatement "that courts have been purporting to apply 'strict' liability doctrine to design and warnings cases while in fact applying principles that look remarkably like negligence.").

3. Not only is there little difference in the law among the different States, but disparity between state and federal law arises only when needed most to promote vehicle safety—that is, when federal standards are outdated or otherwise grossly inadequate. The Third Restatement advises that a product's compliance with applicable safety statutes and regulations is "properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation." Restatement (Third) of Torts: Products Liability § 4(b) (1997). Nearly every State follows this or a similar approach, see Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 Tul. L. Rev. 1203, 1227 & nn. 87-90 (2010), many providing by statute that regulatory compliance creates a rebuttable presumption that the manufacturer is not liable, see, *e.g.*, Colo. Rev. Stat. § 13-21-403(1) (West 2010); Fla. Stat. Ann. § 768.1256(1) (West 2010); Ind. Code Ann. § 34-20-5-1 (West 2010); Kan. Stat. Ann. § 60-3304(a) (West 2009); Ky. Rev. Stat. Ann. § 411.310(2) (West 2009); N.D. Cent. Code Ann.

§ 28-01.4-02 (West 2009); Tenn. Code Ann. § 29-28-104 (West 2010); Tex. Civil Practice & Remedies Code Ann. § 82.008(a) (West 2009).

To be sure, regulatory "compliance does not preclude as a matter of law a finding of product defect" under the prevailing approach. Restatement (Third) of Torts: Products Liability § 4(b) (1997). Such a conclusion "may be appropriate," however,

> when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise.

Id. at cmt. e. Thus, state law generally permits manufacturers to use compliance with federal law as evidence in defense of a tort claim and, indeed, as dispositive evidence when the federal regulation was carefully considered and is up to date.

4. In short, "[w]hile it is true that properly instructed juries might on occasion reach contrary conclusions on a similar issue," "there is no reason to think that such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that every day bear the risk of conflicting jury verdicts." *Bates*, 544 U.S. at 452. And state tort law and federal automobile regulation have co-existed without material conflict for the more than forty years since the Act's

passage. See Vladeck, *supra*, at 1 ("Historically, state tort and damages law have served as a background to state and federal regulatory law."). Manufacturers have been pressing preemption in response to products liability claims only since 1992, when this Court first recognized the defense in such a case. See Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & Pol'y 1013, 1028 (2007) (discussing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)). But there is no evidence that, prior to that time or since, manufacturers have had difficulty complying with federal requirements while also being held accountable to consumers under state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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